No. 2483

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE W. ALBRECHT,
Plaintiff in Error,

vs.

J. E. RILEY and M. H. MARSTON, co-partners doing business as RILEY AND MARSTON,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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As has been set forth by plaintiff in error in the statement of the case contained in his brief, this is an action for the recovery of damages from the defendants, alleging trespass upon a certain mining claim and cutting and removing timber and wood therefrom by said defendants and their agents and servants, and claiming treble damages therefor under Section 322.

The section provides that,

> "* * * if judgment be given for the plaintiff it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be".

In paragraph IV of plaintiff's complaint, he alleges:

> "That the value of said timber and wood to plaintiff and the reasonable value thereof was, and is, three dollars ($3.00) per cord; that by reason of the acts of the said defendants as above set forth, plaintiff lost said timber and trees sufficient to make 700 cords of wood, and said placer mining claim belonging to plaintiff was greatly damaged, and lessened in value to the amount of $2100.00, that being the value of said wood aforesaid."

It will be noted that the damage alleged is damage to a mining claim and not for the loss of wood or timber. It will be conceded, no doubt, by all parties to this action, that the owner of an unpatented mining claim can only use the timber thereon in so far as same may be necessary for the operation of said mining claim. During the course of this entire case it has not anywhere been shown that the timber or wood alleged to have been removed from the claim in question was necessary to the operation of the mining claim or that the value of the mining claim was lessened by its removal and nowhere has it been shown that the mining claim has been at all injured or damaged by the cutting or removal of said timber. In so far as anything appears from the record in this case, the timber so cut and removed did not lessen the value of the mining claim. It is an elementary rule of law, of course, that, where damages are sought to be recovered, some damage must be shown, and before a plaintiff in an action such as this can

recover treble the amount of the alleged damages, he must, of course, show what those damages were.

The plaintiff in error has cited a great many points and authorities in his brief, and it may be said that if in the course of the trial of this case he had proved the damages claimed, those points and authorities might be applicable, but, under the circumstances, we cannot see where they can have any application here. Further answering this phase of the brief of the plaintiff, we deem it only necessary to quote from the opinion of the learned judge in the court below, as follows:

> "It is an action to recover treble damages, under the statutes, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover—that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff. The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damages. And while this question has not been raised in this case, as to the measure of damages, in an action of this kind if it were submitted to the jury it would be necessary to consider what is the plaintiff's measure of damage for wood taken off the mining claim. He has not an absolute fee-simple title. He simply has the right to his mine upon the ground, so long as he complies with the Statutes of the United States. He has the

right to use the wood upon the ground for mining purposes, but he has not the right to take the wood from the ground and sell it elsewhere. The Government can still restrain him from doing that. Now the view I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood, that would necessarily be the measure of damages. There seems to be several different rules laid down by which damages are measured, where wood or grain is taken from land—timber particularly. It may be measured by the value of the wood upon the mining claim; or it may be measured by the value at the place where it was converted by the other party. In this case I suppose it would be upon Otter Creek, if that rule were applied—or it may be the difference between the value of the land with the wood upon it, and the value with the wood gone. And I think the latter rule would be the one to apply in a case of this kind, because the owner of a mining claim has no right to sell the wood. He has only the right to use it upon the ground; and the damage so sustained would be the difference between the mining claim with the wood upon it, and the value of the claim if the wood were gone. There has been no testimony whatever in this case as to the value of the mining claim either before or after the wood was gone.

"Giving the fullest effect to the testimony of the plaintiff, as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and marking of the boundaries, I cannot see, if it were submitted to the jury, that they would be justified in finding anything but nominal damages. And, taking that view of the case, I think it is not worth

while to submit it to the jury. Defendant's motion for a directed verdict will be granted."

AS TO DEFENDANT'S FAILURE TO FILE AN AMENDED ANSWER.

Plaintiff makes much of the court's action in denying his motion for an order of default and judgment against the defendants for the reason that the said defendants in open court applied for and obtained permission to file forthwith an amended answer in said cause and that they failed and neglected to file such an amended answer.

The transcript shows that a demurrer was interposed to defendant's affirmative defenses contained in their answer. No demurrer was interposed, in so far as this record shows, to the general denial contained in said answer. The demurrer aforesaid was overruled and defendants given leave to file an amended answer. In so far as this record shows, no attack was ever made upon the general denial contained in said answer, and the same remains intact. All the issues material herein were there raised by that general denial. The leave given by the court to file an amended answer seems to have been given only in so far as the affirmative defenses were concerned. The general denial does not seem to have been affected and still remains on file.

In conclusion, we respectfully submit that a careful perusal of all the evidence in this case fails to disclose any showing whatever upon the part of

plaintiff of any damage to his property, to wit, the mining claim, by reason of the removal therefrom of the timber, and that consequently he failed in the most essential element of his case; and we respectfully submit that judgment herein ought to be affirmed.

Dated, San Francisco,
October 22, 1915.

Respectfully submitted,

T. C. West,
Fernand de Journel,
Henry Roden,
Attorneys for Defendants in Error.